STATE OF MICHIGAN

COURT OF APPEALS

TROY POLICE OFFICERS ASSOCIATION, Plaintiff-Appellee, v CITY OF TROY and TROY ACT 78 CIVIL SERVICE COMMISSION, Defendant-Appellants.	UNPUBLISHED June 12, 2014 No. 314013 Oakland Circuit Court LC No. 12-125981-CL

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In this employment action, defendants appeal from the trial court's grant of summary disposition to plaintiff and order of mandamus compelling defendant Troy Act 78 Civil Service Commission (the Commission) to hold an appeal hearing related to a grievance filed by plaintiff on behalf of Officer Todd Michael. We reverse and remand for entry of summary disposition for defendants.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The basic facts in this case are undisputed. Todd Michael was hired by defendant City of Troy (Troy) as a police officer in 1987. In 2000, 2001, and 2009, Michael received medical treatment for a non-cancerous brain tumor. After his treatment in 2000 and 2001, he returned to work. After his treatment in 2009, Troy required Michael to submit to a psychological examination to determine his fitness for duty, as authorized by the Collective Bargaining Agreement (CBA) between Troy and plaintiff.

In December of 2009, Michael was examined by a neuropsychologist, who determined that Michael was not medically fit for duty as a police officer. In January of 2010, Michael was placed on leave without pay as a result of this determination. Plaintiff filed a grievance on behalf of Michael. That grievance was resolved when plaintiff and Troy agreed to be bound by § 37 of the CBA. Thereafter, pursuant to § 37 of the CBA, Michael was sent for a second examination by a different provider. In August of 2010, the second neuropsychologist concurred with the findings of the first examination and determined that Michael was not fit for duty as a police

officer.[1] Michael exhausted his accrued benefits and leave time in August of 2010, but continued to be on leave without pay status and to receive health and dental insurance coverage from Troy.

Troy's administrative rules and regulations prohibit a police officer from accepting off-duty employment without prior approval from the chief of police. In July of 2011, Michael submitted a request for outside employment. Troy claims that this request was "informal" and lacked "the required paperwork." Plaintiff contends that Michael made four such requests,[2] but does not address Troy's contention that Michael failed to submit a request properly or with the requisite paperwork. In any event, the request(s) was denied, and on August 1, 2011, plaintiff, on behalf of Michael, filed the grievance that is the basis of the instant case.

The August 1, 2011 grievance stated, in its entirety, as follows:

> On July 11, 2011 Grievant Todd Michael submitted a written request for authorization for outside employment. On July 18, 2011 Captain Scherlinck responded "Todd, You [sic] should follow current Department & City policy in this matter." signed [sic] GS. This grievance is based on the Employer's acknowledgment, through Captain Scherlinck's response, that Grievant continues to be an employee and is required to follow "Department & City policy" even though the Employer refuses to pay Grievant wages and/or grant extended leave. This action by the Employer is unfair, unjust, and a violation of the just cause provision of the contract, as well as any state or federal law which may be applicable.
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> The TPOA requests a remedy for this situation by providing Todd Michael with reinstatement and full back pay stemming from the time the Grievant was denied his right to return to work.

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[1] Both parties agree that the second evaluation determined that Michael was not fit to return to his previous duties as a police officer. Plaintiff argues on appeal that the evaluation "suggested that Officer Michael be given the opportunity to work for the Defendant City of Troy Police Department in a desk officer capacity." In its complaint, plaintiff alleges only that Troy "determined that it would not give Office Michael the opportunity to work for the police department in any other capacity, such as performing desk duty . . . ." As neither party has attached the actual evaluations in respect of Michael's protected health information, this Court is unable to determine the truth of plaintiff's assertions, nor of plaintiff's assertion that the initial evaluation contained "many defects."

[2] Plaintiff alleged in its complaint, and contends on appeal, that plaintiff submitted three requests for outside employment after the July 2011 request, all of which were denied by Troy. These applications and denials do not appear in the lower court record, nor is there a record of whether any grievances were filed regarding them.

Under § 13(D) of the CBA, there are four sequential steps to the grievance process (each assuming the matter is not settled in an earlier step): (1) submission of a written grievance to the Division Commander, (2) review by the Police Chief or his designee, (3) referral to Troy's Human Resources Director for decision, (4) submission of the grievance to an arbitrator or the Commission.

Here, the grievance was not settled at Step 1 or Step 2, and thus was filed with the Human Resources Director according to Step 3. Although § 13(D) of the CBA only requires that the Human Resources Director hold a "meeting" with specified persons present, the Human Resources Director in this case convened a hearing where the parties presented argument and evidence. The Human Resources Director issued a written opinion in October of 2011. The opinion notes that the grievance was premised on a violation of the "just cause provision" of the CBA, which provides that no officer shall be "disciplined except for just cause." The opinion also notes that Michael never completed and returned an "Application for Outside Work" form to Troy, and that therefore "there is no legitimate grievance."

The opinion went on to address plaintiff's contention (as apparently was argued at the hearing but not set forth in the grievance itself) that the grievance was premised on the notion that Michael had been either literally or constructively terminated:

> This assertion ignores, however, the provisions of the collective bargaining agreement. The parties agreed in July, 2010, that the question of whether the grievant was medically fit for duty would be dealt with pursuant to the provisions outlined in Article 37 of the collective bargaining agreement. That provision was in fact followed, with the result being that the grievant was determined to be medically unfit for duty. The grievant continues to be on leave without pay. Thus, the grievance is about the issue of outside work, not a suspension or termination.

The opinion concluded as follows:

> The grievant has not submitted an outside work application. Therefore, he has not followed the Departmental policy. He has no basis for a grievance.
>
> The employee has not been disciplined. The employee has not been terminated. He continues to be an employee on unpaid leave, and therefore subject to rules and regulation as are other employees. Therefore, the grievance is denied.

Following the issuance of this opinion, plaintiff sought an appeal before the Commission under step 4 of the CBA grievance process. Although the letter submitting the grievance to the Commission referenced the "Grievance Chain including the Grievance and the Step 1, 2 and 3 Answers" that occurred earlier in the case, the letter also stated that the matter involved "the overarching issue that police officer Todd Michael has suffered a constructive discharge" by

virtue of his fitness for duty determination and placement on unpaid leave status.[3] Troy responded to the effect that the Commission lacked jurisdiction to adjudicate this particular grievance under its own hearing rules, arguing that Michael was not discharged, suspended, or demoted and thus had no right to a Commission hearing.

The Commission granted plaintiff an opportunity to present its argument regarding jurisdiction at its January 19, 2012 hearing. The Commission ultimately denied the request for a hearing without prejudice, finding that Michael had not been discharged, suspended, or demoted, and that there had been no factual finding that Michael was constructively discharged. The Commission indicated that it would hold a hearing upon receipt of a court order indicating that Michael had been discharged, suspended or demoted, or otherwise providing the Commission with authority to hear the case.

Plaintiff then filed suit in the trial court, seeking an order of mandamus compelling the Commission to hold a hearing. Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). At the hearing on the parties' cross-motions, the trial court found that the requirements were met for entry of summary disposition in favor of plaintiff, and for entry of an order of mandamus. Specifically, the trial court found that the CBA provided for a Commission hearing, and that as an employee of Troy, Michael had a right to the hearing under the CBA; thus, the trial court reasoned, plaintiff had a clear legal right to the hearing, the Commission had a clear duty to hold the hearing, and the act was not within the discretion of the Commission.

The trial court further found that Michael had been either "disciplined, demoted or suspended in some way . . . or . . . constructively discharged." The trial court thus granted summary disposition in favor of plaintiff and issued an order of mandamus ordering the Commission to hold a hearing.[4] This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d

[3] The letter stated, "*As noted in the Union's grievance* this matter involves the Grievant's request for outside employment as well as the overarching issue that police officer Todd Michael has suffered a constructive discharge." (Emphasis added). The grievance itself, however, only referenced the former.

[4] The trial court declined to order the Commission to amend its hearing rules as requested by plaintiff, as it found that (1) it lacked the authority to do so and (2) amendment was not necessary because under either the Commission's hearing rules or the Police and Fire Civil Service Act, MCL 38.501 et seq. ("Act 78"), Michael was entitled to a hearing.

468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We review issues of statutory interpretation de novo. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 427; 722 NW2d 243 (2006). We also review questions of contract interpretation, including interpretation of the CBA, de novo. See *Macomb Cty v AFSCME Council 25*, 494 Mich 65, 77; 833 NW2d 225 (2013).

> A trial court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion. But whether defendant had a clear legal duty to perform and whether plaintiff had a clear legal right to the performance of that duty, thereby satisfying the first two steps in the test for assessing the propriety of a writ of mandamus, are questions of law, which this Court reviews de novo. [*Id.* at 438 (citations omitted).]

III. ANALYSIS

"Mandamus is a writ issued by a court of superior jurisdiction to compel a public body or public officer to perform a clear legal duty." *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev'd in part on other grounds 464 Mich 726 (2001). The issuance of a writ of mandamus is an "extraordinary remedy" that is only appropriate when four elements are established: "(1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment[,]" *id.*, quoting *Vorva v Plymouth-Canton Community School Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998), and (4) the party seeking mandamus can show they have "no other adequate legal remedy." *Toan v McGinn*, 271 Mich 28, 33; 260 NW 108 (1935). Further, mandamus may only compel a party to exercise its discretion, not compel a particular result. *Id.* The party seeking mandamus bears the burden of establishing the required elements. *Id.*

Here, defendants challenge the first, second, and fourth elements of the test for establishing the propriety of a writ of mandamus.

Defendants first argue that the trial court erred in determining that defendant Commission had a clear legal duty to hold the requested hearing, and that Michael had a clear legal right to such a hearing. We agree.

Section (13)(A) of the CBA provides for a grievance procedure to resolve "a difference between the Employer and an Association member as to the application, non-application, or

interpretation of specific provisions of [the CBA]." Although the CBA does not contain specific provisions dealing with outside employment, Plaintiff alleged that the grievance related to the denial of Michael's request for outside employment fell under § 15(A) of the CBA, which provides that "No officer shall be disciplined except for just cause."

The CBA provides the escalating four-step procedure for resolution of grievances described above. The parties agree that the grievance was not resolved at Step 3. Plaintiff asserts that Step 4 of the CBA grievance procedure entitles him to a hearing before the Commission. Step 4 states in full:

> Grievances not settled at Step 3 may be filed within twenty (20) calendar days to arbitration or to the Act 78 Civil Service Commission, but not both, with a copy forwarded to the Human Resources Director.

Act 78 provides that "a member of any fire or police department encompassed by this act shall not be removed, discharged, reduced in rank or pay, suspended, or otherwise punished except for cause" and further provides that "[i]f the person sought to be removed or reduced demands it, the civil service commission shall grant him or her a public hearing . . . ." MCL 38.514. In recognition of the requirements of Act 78, the Commission has adopted rules for appeal hearings, which provide that "Employees may appeal disciplinary actions resulting in discharge, suspension or demotion to the Civil Service Commission." See City of Troy Civil Service Commission Hearing Rules, Article X, § 1(C).

The crux of the issue before us concerns the characterization of the grievance at issue. Although the August 1, 2011 grievance by its terms refers only to the denial of Michael's "request for authorization for outside employment" and describes that denial as "unfair, unjust, and a violation of the just cause provision of the contract," plaintiff now characterizes the grievance as involving a claim for constructive discharge by virtue of being placed on leave without pay as a result of his fitness for duty examination. However, it is undisputed that plaintiff filed a grievance on behalf of Michael regarding that issue in 2010. That grievance was ultimately resolved by the parties' agreement to a second fitness for duty examination pursuant to the provision of the CBA providing for psychological examinations. Plaintiff did not request an appeal hearing before the Commission regarding that grievance. The CBA provides that "grievances not appealed from one of the steps of the grievance procedure within the prescribed time limits shall be considered automatically closed." Plaintiff therefore cannot belatedly appeal the subject matter of the prior grievance by bootstrapping it to the current grievance concerning the denial of authorization for outside employment.

Based on the plain language of the grievance itself, stripped of subsequent characterizations related to the resolved and not-appealed issue of Michael's placement on leave without pay, the grievance contains only the allegation that the denial of the application for outside work somehow amounts to discipline without just cause. As noted above, the CBA does not contain specific provisions concerning outside work applications. Further, both the Human Resources Director and the Commission determined that the denial of the application was not a

disciplinary action, especially in light of the fact that it was based on Michael's failure to even file the proper paperwork.[5]

Simply put, plaintiff's grievance was not a proper grievance under the CBA, as it did not relate to the resolution of "a difference between the Employer and an Association member as to the application, non-application, or interpretation of specific provisions of [the CBA]." Further, the denial of an application for outside work, particularly where the employee did not file proper paperwork, is not "discipline" and thus does not fall within the CBA's prohibition of "discipline[] except for just cause." We therefore reject plaintiff's contention that § 13(D) of the CBA entitled Michael to a hearing before the Commission.

Moreover, the denial did not result in Michael being "removed, discharged, reduced in rank or pay, suspended, or otherwise punished," or constitute a "disciplinary action[] resulting in discharge, suspension or demotion," so as to trigger his right to hearing under Act 78 or the Commission's rules. See MCL 38.514(1) and Article X, § 1(C) of the City of Troy Civil Service Commission Hearing Rules. The denial merely resulted in a continuation of Michael's status as being on leave without pay.

We therefore also reject plaintiff's contention that Act 78 itself authorizes and requires the Commission to hold a Step 4 hearing. First, the scope of the Commission's jurisdiction and authority is not determined by the parties to a collective bargaining agreement. Rather, the parties to a collective bargaining agreement may contractually invoke the jurisdiction of the Commission, but in doing so are limited to the scope of the Commission's jurisdiction as it otherwise exists. The scope of the Commission's jurisdiction is therefore not determined by the CBA, but rather is determined by Act 78 and the rules promulgated thereunder. Second, the denial of Michael's outside work application did not, in any event, constitute a "disciplinary action" or "punishment," nor did it result in Michael being "removed, discharged, reduced in rank or pay, suspended." Consequently, Act 78 does not convey jurisdiction on the Commission relative to the grievance at issue.

The trial court thus erred in determining that the Commission had a clear legal duty to hold, and that plaintiff had a clear legal right to, an appeal hearing concerning the August 1, 2011 grievance.

Because we find that plaintiff did not carry its burden of demonstrating a clear legal right on behalf of plaintiff or a clear legal duty on the part of defendant, we need not address defendants' additional claim that plaintiff has an adequate legal remedy available by virtue of Michael's federal lawsuit against Troy for violations of the Americans with Disabilities Act.[6]

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[5] Again, plaintiff refers to other applications for outside work that were subsequently rejected. These applications are not part of the lower court record.

[6] Michael has asserted claims in the federal lawsuit for discrimination and retaliation under the Americans with Disabilities Act, 42 USC § 12101 et seq. Many of the allegations mirror those of this matter. Plaintiff is not, however, a party to the federal lawsuit.

V. CONCLUSION

Although plaintiff seeks to cast Michael's August 1, 2011 grievance as alleging constructive discharge without just cause or a disciplinary action resulting in demotion or reduction in pay, the Commission correctly determined that Michael had not been subject to disciplinary action and was not entitled to an appeal hearing. We hold that the trial court erred in concluding that the Commission had a clear legal duty to hold such a hearing and that Michael had a clear legal right to such a hearing, in light of the fact that the issue of his placement on leave without pay was resolved pursuant to the CBA nearly two years prior.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Mark T. Boonstra